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No. 32.

War Power of the President.

BY J. HEERMANS.



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**LOYAL PUBLICATION SOCIETY,
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No. 32.

**WAR POWER OF THE PRESIDENT—SUMMARY IMPRISON-
MENT—HABEAS CORPUS.**

THE Constitution of the United States establishes a GOVERNMENT, and not a confederacy or compact merely. This is obvious from the facts that it institutes all the essentials of governmental power: a legislature, an executive, and a judiciary; and that these powers are independent of, and superior to, the several state legislative, executive, and judicial powers; so that we have an independent self-existent government. It matters not that it is constitutionally limited in its purposes, it is, within its constitutional sphere of action, as perfect a sovereignty as any government on the face of the earth; for, "this constitution, and all laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding;" and, "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority;" and, "the senators and representatives before-mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution."

We have, then, a National Government comprising a legislature, invested with certain specified law-making powers; an executive, to see that the laws are faithfully executed; and a judiciary to maintain all the legitimate powers of the government intact.

And in its territorial jurisdiction, this government is co-extensive with the thirty-four states of the Union, and all other territory thereunto belonging. And it was established in perpetuity ; all its powers were *given, granted, and conveyed* forever, save so far as they may, from time to time, be amended in the way prescribed in the Constitution. Constitutionally, then, this government is perpetual. It has a right to live in the plenitude of its power, and the integrity of its territorial sovereignty. And this right of life and perpetuity is necessarily a primary and fundamental constitutional principle—paramount to everything else. Every specific provision of the Constitution is as obviously subordinate to it as if a clause to that effect were plainly written down, for the continued life of the government is the indispensable basis upon which the entire Constitution rests.

Assuming, then, the controlling principle of the Constitution to be, that the government and the Constitution itself *shall live*, it is self-evident, that this same controlling principle carries with it all the needful power to protect and defend the government in all its political and territorial sovereignty ; so that there is *somewhere* in the government a constitutional power to resist and suppress a rebellion, limited only by the necessity of the case ; power unlimited to use any and all means necessary or expedient to suppress it ; power to put everything out of the way that in any manner, or in any degree, endangers the life of the government.

We say this principle flows naturally from the right of the government to live ; and we may go a step farther, and trace it to a still deeper source in the constitutional fountain ; to the constitutional fact that we have a government. For without this principle, it cannot be said that the government has really a right to live ; without it, any portion of the people could destroy the government at will ; and without the right to live, what we have been in the habit of calling a government, is really no government at all. If we have a rightful government, that government has a right to live ; if it has a right to live, it has a right to defend itself against rebellion ; and if it has a right to defend itself, it has a right to use all needful means for that purpose. If it has not the right thus to defend itself, the rebels have the right to destroy it ; for it cannot be wrong to destroy it, and also wrong to defend it. I cannot comprehend the Buchanan doctrine, that the rebels have not the right to destroy the government, and that the government has not the right to resist them. It makes the Constitution a jumble. It makes it mean neither one thing nor the other,

and puts sovereignty nowhere. Rejecting this mysterious doctrine, therefore, we must admit, either the unlimited right of the government to defend itself, or the right of the South to break up the government. There is no middle ground.

This brief deduction of constitutional principles, conclusive in itself as it seems to be, is specifically endorsed and confirmed by this clause of the Constitution :

“Before he enters on the execution of his office, he shall take the following oath or affirmation: I do solemnly swear (or affirm), that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.”

This clause commands the Constitution to be preserved, protected, and defended, *not* conditionally, not in any particular manner, not by any limited means, and not in subordination to the dicta of judges or anybody else; but *to the full extent of the President's ability*. This language sounds very much as if the first object of the Constitution is to preserve and perpetuate itself. Paramount to everything else, it shall be preserved, protected, and defended. Such is the palpable import of the language. Now, to preserve, protect, and defend the Constitution, it is indispensable that this rebellion shall be suppressed; so that this clause plainly and unequivocally requires and commands that the rebellion shall be put down by any efficient and necessary means whatever. And it constitutes and appoints the President the chief agent of the nation to do this work. It swears him to do it to the best of his ability, while it does not require any other man to be so sworn. Other officers are sworn simply to *support* the Constitution—he is sworn to *preserve, protect, and defend* it. To support the Constitution is to uphold it by our ordinary influence and not oppose it; to preserve, protect, and defend it to the best of one's ability, is to seek out its enemies who make war upon it, and their aids and comforters, and put them down.

Constitutionally appointed commander-in chief, for this purpose, too, the President is the embodiment of the unlimited national sovereignty for the active work of preserving, protecting, and defending the Constitution; in other words, for suppressing rebellion. Whatever the nation has a right to do in this behalf, he is the lawful agent to do, with all the material means placed at his command by Congress. Therefore, the Constitution is imperative that he shall suppress this rebellion by any and all needful measures, to the best of his

ability. He is not only the commander-in-chief of the army in the field and the navy on the waters, but the special conservator of the Constitution in all respects, with jurisdiction co-extensive with the whole Union. His power in this behalf reaches Maine and Minnesota, as well as Virginia and Carolina.

Tell me now, ye croakers for "the Constitution as it is," why it is that the President may lawfully shoot down our own citizens in rebel armies, or imprison them, or destroy towns and cities and other property, "without due process of law," in the face of the plain constitutional provision, for which you clamor so long and so loudly, that "no person shall be deprived of life, liberty, or property, without due process of law." It is because the Constitution is not a self-destroying instrument; because no part of it was designed to aid traitors in the unholy work of destroying the whole; because there is nothing in it calculated to hinder or obstruct the work of maintaining it as the supreme law of the land; because that and all kindred provisions are subordinate to the great fundamental principle of the right of the government to live and defend itself against all perils; because this principle obviously implies that every specific provision of the Constitution shall be construed consistently with the amplest right of the government to suppress rebellion by all needful means; and because the government, having the right to live, has the correlative right to use sufficient means to preserve its own life, precisely as an individual has the right to defend his life by any necessary means, even to taking the life of an assailant.

If all this be sound constitutional law, it follows, necessarily, that, in the execution of the great trust that is upon him, with the solemn oath upon his soul, that he will preserve, protect, and defend the Constitution to the best of his ability, the President not only has a constitutional right, but it is his inexorable duty to suppress by sufficiently summary means, anything and everything, anywhere and everywhere, within the Union, which, directly or indirectly, adds strength to the rebellion. Tell me not that there is no rebellion in the loyal states. If any man in Pennsylvania or Massachusetts is guilty of any act which tends to aid the rebel arms, or to obstruct or impede the President in his work of crushing out the rebellion, that man is a part and parcel of the rebellion, as much so as is the soldier who carries a rebel musket in the field; and it is as clearly the President's duty to suppress him as it is to suppress those in arms.

But the courts in the loyal states are open, it is urged, and there-

fore, why not do all this through them? Because he cannot so surely do it thus. The Constitution is imperative that *he shall* suppress such men; and there is nothing in the Constitution that permits him to evade it by leaving it to the hands of another department of the government, which is independent of him. And, besides, the courts *cannot* do it efficiently. When the traitors of the loyal state of Maryland were concocting their grand scheme to hurl the organized power of that state against the government, probably not a man of them was known to be guilty of any act for which he could even have been arrested by civil process. And whatever their offences against the laws might have been, and whatever the fidelity of the courts in that jurisdiction, the process of civil law would have been far too slow to prevent the consummation of the gigantic treason which would have added another state to the rebellion. And yet these men were doing more to aid the rebel cause than ten thousand armed men in the field could do. Courts could not have suppressed that unholy work, but the summary imprisonment of those few men saved the state of Maryland to the Union cause. And so in most other cases of disloyal practices in the loyal states. Adroit traitors, in loyal communities, can render more aid to the rebellion, without rendering themselves liable to any civil law, than ten times their number in the rebel army. That aid is none the less valuable to the enemy, or less dangerous to the government, for not being violations of statute laws. Statute books, and courts, and juries, cannot save the republic. The rebellion is one indivisible whole, comprising all the rebels in the land, North and South; and the President is charged with the duty of suppressing *all of it*. And if *he* is to do it, he must do it by military power—he must do it *all* by military power, for he cannot control any other power.

Assuming, then, that the President has the constitutional right to use any *needful* means to suppress rebellion, and, to this end, to use the like means to suppress everything that aids it, it must be confessed, that here we stand at the threshold of despotism. Here is the boundary line of our constitutional government, with a not very distinct line of demarcation between it and despotic power. I think I have made it plain that *necessity* is the only line. The President may do, he *must* do, whatever is necessary to suppress the rebellion, and preserve the life of the government. But who is the *judge* of the necessity of any particular act? If the President is the final judge, there is virtually no limitation to his power in the premises, and we

make him a despot. Undoubtedly he must judge in the first instance—there is no alternative—just as a man whose life is assailed, must judge immediately what degree of force is necessary to repel the attack and protect his own life. But it stands the President in hand to judge wisely, just as it does the individual. The man who kills his assailant *unnecessarily*, will not be held guiltless by a court and jury, who are the final judges of the transaction. Exactly so with the President. His government is assailed, and its life imperilled by armed and unarmed traitors. The Constitution empowers him to do everything that is necessary to suppress these traitors, all of them, to the end that the life of the government may be saved—just as the law empowers an individual to do everything necessary to suppress an assassin to save his own life. But beyond this necessity, the President has not an iota of power more than any other man. While he may lawfully shoot down armed and resisting rebels, because they cannot be otherwise suppressed, to take the lives of unarmed rebels in the North, or of prisoners taken in arms, would be murder, because their further aid to the rebellion can be suppressed by imprisonment. To take their lives is, therefore, not necessary, and not constitutional. And while he may lawfully suppress disloyal practices in the North, by imprisoning their authors, because such is the mildest efficient means to that end, and therefore necessary to the suppression of the rebellion, the imprisonment of any other persons would be unconstitutional and false, and the President and every other person engaged in it would be personally liable in law for the same. Such is the constitutional theory upon which we are authorized to make war against rebellion.

The President and his subordinates are, therefore, under a delicate and terrible responsibility. While the Constitution requires him to do anything and everything necessary to suppress all men who, in any manner, or in any degree aid the rebellion, the courts will hold them accountable for any acts beyond this; and Congress cannot relieve them from this responsibility. To do so would be to authorize the violation of the Constitution, and it is scarcely necessary to say that such an act would be null and void. Inasmuch as the President has *constitutional* power to do all that is *necessary* to suppress rebellion, he needs no protection from Congress for the exercise of this power; and as there is no power anywhere in the government to go beyond this, I think it is self-evident that Congress cannot grant any power in the premises; and if it cannot do this, it cannot relieve the President or anybody else from the legal consequences of a usurpation.

Now, if I have succeeded in demonstrating that the Constitution empowers the President to imprison persons by military power, to suppress disloyal and dangerous practices, I think it clearly follows, as a concomitant to this power, that he may suspend the privilege of the writ of habeas corpus, because the writ of habeas corpus is inconsistent with that kind of imprisonment. For instance, in the case of those Maryland prisoners to whom I have alluded ; they were arrested and imprisoned by military authority, under the clearest necessity to the public safety. Suppose they had been brought immediately before a judge on a writ of habeas corpus. The judge would have inquired simply into the legality of the imprisonment. If legal, they would have been remanded to prison ; if not legal, they would have been discharged. The civil courts are, as I have said, independent of the President. They have no jurisdiction of military affairs, nothing to do with the President's work of suppressing rebellion. Their province is to administer the laws as they find them on the statute-books, and nothing else ; so that with those men before Judge Taney, or any other judge, on a writ of habeas corpus, without any charge of crime regularly entered against them according to the civil code, they would necessarily have been discharged, to pursue their work of treason, and the President's power in the premises would have been nugatory. This independence of the judiciary, this antagonism, if you please, between the civil and the military authorities, is what creates the necessity for the suspension of the writ of habeas corpus at all. This is why the suspension was not entirely prohibited in the Constitution. Its sole object is to prevent the courts from paralyzing the military arm of the government in times of public danger. If the courts were bound to take cognizance of military necessities, and were competent to appreciate them, there would be no need of a constitutional power to suspend the writ of habeas corpus at all. If Judge Hall, at New Orleans, could have administered the law of military necessity, as General Jackson found it pressing upon him, the general would have had no occasion to suspend the writ of habeas corpus.

All this shows the suspension of the writ to be purely a military prerogative. It is constitutionally permitted, only as a military necessity—i. e., “in cases of rebellion or invasion, when the public safety may require it ;” and none but the military authorities can know when the public safety does require it.

The constitutional provision that “the privilege of the writ of ha-

beas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it," is not a *grant* of the power to *suspend* it, as superficial statesmen seem to suppose; but merely a *limitation* of the power, which it implies, is granted to somebody, in some other part of the Constitution. And the fact that this limitation is found in the article devoted chiefly to the legislative department, does not imply that the power is in Congress; for the *section* in which it stands contains limitations and prohibitions clearly applying to others as well as to Congress. The power in question grows out of the constitutional facts that this is a government; that it has a right to perpetuate itself, and that the power is a necessary incident to the unlimited power to suppress rebellion, which is committed to the hands of the President, as I have tried to elucidate.

It may be added, furthermore, in respect to this whole matter, that independently of the specific constitutional charge that is upon the President to suppress rebellion, as I have tried to set it forth, his constitutional appointment to be commander-in-chief of the army and navy, without prescribing the powers of that office, invests him with all the usual powers of a commander-in-chief, as recognized by the usages of civilized nations. By this criterion, he is the supreme ruler in all that appertains to the conduct of a war. His primary business is to subdue the enemy, and his discretion in the use of the means placed in his hands to that end, is limited only by the laws of nations, and the Constitution as hereinbefore set forth. His commands in this behalf, limited as aforesaid, are the law of the land for the time, and supercede whatever civil laws may be in conflict with them; for war—civil war especially—is an appeal *above* the civil laws, and not the execution of them. This being so, it needs no argument to prove that anything whatever, in any part of the country, that tends to impede the progress of the national army in suppressing this rebellion, by strengthening or encouraging the enemy, or otherwise, directly or indirectly, may be lawfully suppressed by military authority.

Now, a word as to the clamor about despotism, and the danger of the subversion of the Constitution and the people's liberties. War partakes very much of the character of despotism, the best way we can fix it; necessarily so, in the nature of things; recognized to be so by the laws of nations, and so accepted by our Constitution; so that it is no subversion of the Constitution for a war to be carried on

in the way that wars are always carried on, in the way that wars *must* be carried on, if they are wars at all; i. e., by power more or less despotic. And, with the constitutional limitations and responsibilities, as hereinbefore stated, I think there is not the slightest danger that these war powers will be permanently fixed in the ordinary administration of the government. They are in the President's hands for use upon disloyal persons, and nobody else; they exist during the war, and at no other time; and for the purpose of suppressing the rebellion, and for no other purpose. Can any man with professions of loyalty to his government on his lips, object to this? Any objections to it are objections to suppressing the rebellion at all.

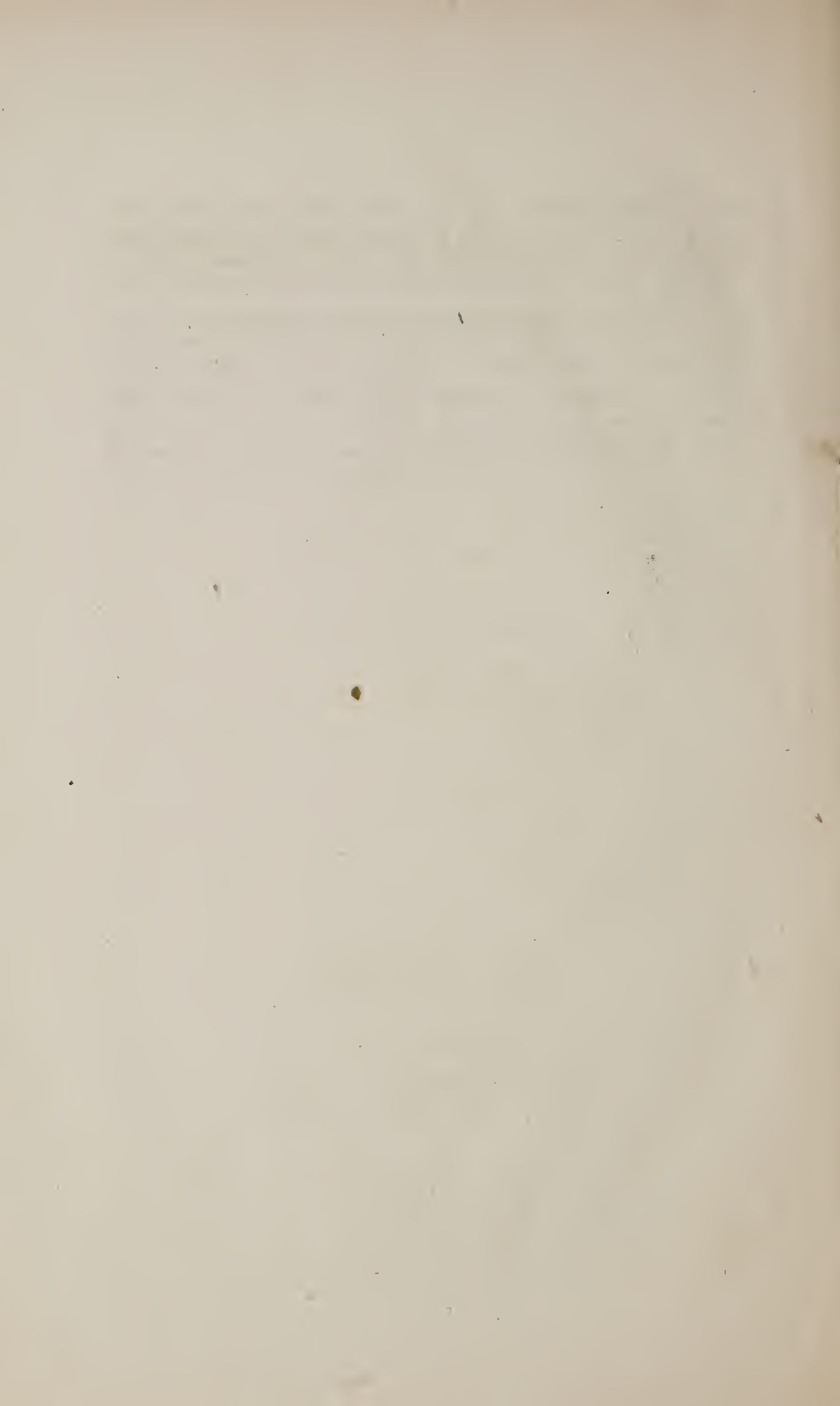
Say ye that these are dangerous powers to concede to a President, with a million or so of soldiers at his back? No, the *use of these powers* can, in any event, be dangerous only to the rebellion and the rebels, for they reach not an inch beyond them. If, however, you will have it that our liberties are just now endangered in this behalf, the danger results not from the existence or the exercise of these powers to suppress the rebellion, but from the constitutional fact that the President has command of the army of the nation, and the possibility that he may *overreach* these powers, and *thus* rob us of our liberties. To a tyrant chieftain, however, with an invincible army to do his bidding, it matters not where you draw the line of his lawful powers. Draw it where you will, it will not retard his advance to the goal of his ambition. But, after all, if you must insist that our present proverbially honest and patriotic Chief Magistrate is bent on the subversion of the liberties of his country, we have a certain security in the army that he commands; an army not of mercenaries fighting for a master and for their bread, but an army made up of our own citizens, a part of the great constituency of the Republic, from every nook and corner of the land, our sons, our brothers, and our neighbors, representing the sovereignty of the nation in the field; fighting, not for Abraham Lincoln, or for any other man, fighting, not to destroy their own government and their own liberties, but fighting only to crush out this rebellion, for the Constitution and the Union, for their own liberties, as well as ours. In an army such as this we have all the safety that a rebellion, such as this, admits of.

In conclusion, therefore, the Constitution is sufficient for any emergency of national danger. It invests the government with ample power to preserve and perpetuate itself, without impairing the rights, or endangering the liberties of the people. Let all the people of the

loyal states sustain and defend it, in the only way in which it can possibly be sustained and defended in such a time as this; *i. e.*, by aiding and encouraging, sustaining and supporting, the lawful agents of the government, in striking down its confessed enemies. Then we shall have no arbitrary arrests in loyal states; then this rebellion will speedily totter to its fall; then this Union will be established as upon the rock of ages; then we may defy the machinations of all the despotic powers of the Old World to impede our progress, or to cripple our power; then our tree of liberty will take a deeper root, and send its branches upward and outward until they encircle the whole earth.

HYDE PARK, PA., *June*, 1863.





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